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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 238.

THELMA MARTIN,

Appellant;

vs.

CITY OF STRUTHERS, OHIO,

Appellee.

Appeal from the Supreme Court of Ohio.

APPELLEE'S BRIEF.

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STATEMENT OF FACTS.

On the afternoon of July 7, 1940, the appellant visited the home of Albert Charles Swartlander, 724 Creed street in the city of Struthers, Ohio, for the purpose of distributing literature and soliciting certain funds. The facts adduced at the time of the trial in the mayor's

court in the city of Struthers, Ohio, also showed that the appellant was a member of a group known as Jehovah's Witnesses. This particular group made it a practice of visiting the city of Struthers, Ohio, once or twice or three times a week, especially on Sunday mornings, and in the early afternoon of the same day, and possibly during the week once or twice. These visits, which were repeated regularly, aroused the citizens of the city of Struthers, Ohio, and caused them to protest and to request the police department to grant them some form of relief by curtailing their activities. Most of the complaints were based upon the element of disturbance and annoyance which came about because of these repeated visits. In an honest and sincere effort to answer and carry out the various complaints which the citizens of the city of Struthers, Ohio, made, the police invoked and applied the ordinance in question, to wit, Section 41 of Chapter 21 of the ordinances of the city of Struthers, Ohio, which ordinance reads as follows:

> "It is unlawful for any person distributing handbills, circulars, or other advertisements, to ring the doorbell, sound the door knocker, or otherwise summon the inmate, or inmates, of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements, they, or any person with them, may be distributing."

The appellant was given a hearing before the mayor of the city of Struthers, Ohio, and was properly represented by counsel. After introduction of all the evidence, the mayor found the appellant guilty. An appeal was taken from this conviction to the Court of Common Pleas, and upon appeal the case was heard before Honorable Erskine Maiden, judge of the Court of

Common Pleas of Mahoning county, Ohio, and the conviction was sustained and confirmed. An appeal was then taken to the Court of Appeals of the Seventh District of the state of Ohio, and the Court of Appeals sustained the decision of the Court of Common Pleas. This particular decision was likewise appealed to the Supreme Court of the state of Ohio, which appeal was dismissed upon a writ to certify, upon the basis that no constitutional question was involved, after which then the appellant perfected her appeal to the Supreme Court of the United States, which court held that the constitutional question was not properly presented in the state courts, therefore the court had no jurisdiction in the matter, and a mandate from the Supreme Court of the United States was directed to the state courts and the appellant paid her fine and the case was closed. Then the Supreme Court of the United States, upon its own motion on the eighth day of February, 1943, noted proper jurisdiction, without a written opinion and without any argument or without notification of counsel for the appellee.

Counsel for the city of Struthers, Ohio, state to the court that the appellant, Thelma Martin, was one of a group who invaded the city of Struthers on the day in question. The term "invaded" is used because carloads of individuals professing to belong to her group concentrated their efforts upon various sections of the city for the purpose outlined above. It must further be remembered that the ordinance in question makes no exceptions, but covers all types of distributors and solicitors. It must further be remembered that it is purely regulatory in character, and not prohibitive. Most important of all,

it must be kept in mind that no case stands on record that is similar to the case at bar. Practically all ordinances governing the distribution of literature and pamphleteering throughout the United States either require the issuance of a permit, or prohibit the practice in its entirety. The police measure in question does not prohibit, but merely regulates. It is a reasonable police regulation exercised by the city of Struthers in conformance to the delegated powers granted it by Article 18, Section 3 of the Constitution of the state of Ohio.

I.

The ordinance in question, Section 41, Chapter 21 of the ordinances of the city of Struthers, Ohio, which reads as follows:

> "It is unlawful for any person distributing handbills, circulars, or other advertisements, to ring the doorbell, sound the door knocker, or otherwise summon the inmate, or inmates, of any residence to the door for the purpose of receiving such handbills, circulars, or other advertisements, they, or any person with them, may be distributing"

answers the purpose of protecting the quiet enjoyment of the home makers, and the mere fact that some person wishes to violate it by distributing literature and soliciting donations, should not exclude that solicitor from the application and operation of the ordinance.

ARGUMENT.

It must be remembered that the ordinance emanates from an industrial community where men work in the steel mills. This industrial area, centered around the production of steel, maintains in its plant a "swing turn." That is, men work from 8:00 a. m. to 4:00 p. m., 4:00 p. m. to midnight and from midnight till 8:00 a. m. Most of the complaints in Struthers, Ohio, arose from the fact that men who have returned from the midnight to 8:00 a. m. turn would retire for a day's rest. The other immediate members of the family would go to church. Then our complaint would result by virtue of the fact that the defendant in question would rap on the door or ring the doorbell for such a length of time that the tired worker would have to answer the knock. This abuse repeated at regular intervals would necessitate regulation.

It is a primary comfort in the American way of life that the American public enjoys the privilege and right of "sleeping in" on their day of rest. The disturbances created by the intrusions of the defendant and others belonging to her group made it imperative that the city of Struthers, Ohio, invoke the regulatory measure now before the court.

In **Vol. II Cooley's Constitutional Limitations**, at page 1226, we note:

> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as

regulations designed to promote the public health, the public morals, or the public safety."

On that same page we find this quotation:

"It may be said in a general way that the police power extends to all the great public needs."

Chicago, Burlington & Quincy Railway Company v. Illinois, 200 U. S., 561-592:

"In that case we rejected the view that the police power cannot be exercised for the general well-being of the community. That power, we said embraces regulations designed to promote the public convenience, or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.

All persons agree that to the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed may enjoy a respite from labor at the same time."

Bloom v. Richards, 20 S., 393.

This practice of annoying people is merely regulated by the ordinance. The ordinance stands on a reasonable basis of not prohibiting the distribution in its entirety; it merely regulates the conduct of the distributor and prescribes the manner in which it can be carried on.

Another way in which this police measure protects the public is evident when it prevents the defendant or distributor from forcing his views upon the householder. As individuals enjoying inalienable rights, each man has the right to reach his own conclusions without having someone intrude into his domestic circle to dictate when, where, or to what God its inmates shall address their

orisons. Can it not be said that this practice of calling upon householders is virtually a mandate to the householder to come to the door and give audience to one who professes to be engaged in the propagation of a sacred enterprise? If sanctioned, this practice would create an inequality of right and privilege. It would result in compulsory support of religious instruction. This phase of American life must be voluntary.

The measure in question is protection for the householder against unjustifiable vexation and harassment incident to repeated visits by the appellant and her group. It does not prohibit the practice, but merely regulates it. Householders have been patient and their present attitude indicates that the advantages which distributors or callers once brought them have long since been outweighed by detriments.

Vol. 31 Michigan Law Review, page 543.

Appellant stresses the fact that the right to call upon people results from implied invitation. The implied invitation is removed by the terms of the ordinance the moment the appellant tried to summon the inmate of the home to the door.

McCormick v. City of Montrose, 90 Pac. Rep. (2d Series), at page 974:

> "The ordinance here in question has this effect. It abolishes the presumption of an implied consent from a custom that may have existed for solicitors to enter upon premises uninvited and a failure of the householders to take affirmative action, as by placing on or near the entrance a sign that solicitors are not allowed, and creates a presumption of lack of consent to go upon the premises unless an invitation can be shown."

The ordinance of Struthers, Ohio, does not bar distribution. It merely regulates, and by its regulation it preserves the general weil-being of the community.

It must be remembered that the appellant was one of a large group. The community on the morning in question was flooded by people who professed to be engaged in a special calling. The practical application of the ordinance was not invoked because of an isolated case; it proved itself as a regulatory measure geared to prevent such unwarranted invasions. If the appellant merely sought to distribute and not summon the inmates of the household, the clash between the police measure and her calling would not have happened:

Reynolds v. U. S., 98 U. S. Rep., 145:

"A party's religious belief cannot be accepted as a justification for his committing an overt act made criminal by the law of the land."

At page 166:

"Laws are made for the government of actions and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifice were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or, if a wife religiously believed it was her duty to burn herself upon the funeral pyre of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice? So, here as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the pro-

fessed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances."

Davis v. Beason, 133 U. S. Rep., at pages 342-343:

"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for His being and character and obedience to His will. It is often confounded with the cultus, or form of worship of a particular sect, but is distinguishable from the latter. The first amendment to the Constitution in declaring that Congress shall make no law respecting the establishment of religion or forbidding the free exercise thereof was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect. The oppressive measures adopted and the cruelties and punishments inflicted by the governments of Europe for many ages to compel parties to conform in their religious beliefs and modes of worship to the views of the most numerous sect and the folly of attempting in that way to control the mental operations of persons and enforce an outward conformity to a prescribed standard led to the adoption of the amendment in question. **It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the beliefs, good order and morals of society.** With man's relations to his Maker, and the obligations he may think they impose and the manner in which an expression shall be made by him of his belief on those subjects, no

interference can be permitted, provided always the laws of society designed to secure its peace and prosperity and the morals of its people are not interfered with. **However free the exercise of religion may be, it must be subordinate to the criminal laws of the country passed with reference to actions regarded by general consent as properly the subject of punitive legislation.**" (Emphasis ours.)

"Presumably, when a legislative act is passed it represents the sentiment and expresses the judgment of a majority of the citizens within the legislating governmental division or subdivision that passes the act as to the proper policy to be pursued with reference to the subject of the legislation."

McCormick v. City of Montrose, 99 Pac. (2d Series), at page 974.

The practice aimed at by the ordinance in question has been annoying to home occupants, resulting in a great deal of inconvenience, irritableness and discomfort to persons who each week or possibly twice and three times a week are summoned to the call of one who delivers the same message.

Overruling this measure would subrogate the privacy of a home and elevate the right to call on people at any time and without invitation. The household would not be a safeguard against intrusions. As it now stands, the right to distribute is kept intact but the mode of doing it is regulated. This police measure preserves the quietness of home life against intrusions, unexpected calls and uninvited guests.

II.

The police measure is a reasonable exercise of the police powers and not arbitrary, discriminatory or op-

pressive, and furthermore it regulates the conduct of individuals classed under the law as "trespassers."

Under Ohio law the appellant is classed as a trespasser, **Keesecker v. G. M. McKelvey Company**, 64 O. A., at page 29. The element of trespass has certainly given the legislative authorities the right, power and authority to legislate upon that practice. This same principle is set out in the **Restatement of the Law of Torts**, page 891, Section 329:

> "One who intentionally and without a consensual or other privilege, enters the land in possession of another, or any part thereof, or causes a thing or third person so to do, or remains thereon, is classed as a trespasser."

The ordinance does not prohibit pamphleteering. It regulates its distribution in private places. Some of the measures which tended to control this type of practice, enable the exercise of censorship by delegating to one party the right to refuse a permit. The measure in question does not contain such a delegation.

The real distinction attributed this ordinance is based on the fact that the numerous cases dealing with house to house canvassing fail to bring to light a measure so lax in its scope of regulation. **People v. Bohuke**, 287 N. Y.; 154, cites an ordinance somewhat similar to the one in question. The court in that case held:

> "That the ordinance does not infringe any of appellants' rights to the free exercise of their religion since it merely regulates their entry onto private property for the purpose of promoting their religious belief * * * the Constitution does not guarantee them any right to go freely onto private property for such purposes."

Counsel for appellant cites the case of **Zimmerman v. Village of London, Ohio,** 38 Fed. Supp., 582, as bearing upon our problem, but he fails entirely to give this court two major distinctions, namely the ordinance in the village of London case prohibited the practice of distribution entirely, whereas the ordinance of the city of Struthers, Ohio, regulates the practice of distribution. Furthermore, the court, in its opinion on page 584, recognizes the right of regulation, to wit:

> "Democracy rests upon the theory that all men are possessed of certain inalienable rights; these rights, if democracy is to survive, must be based upon mutual tolerance and understanding. They give to no class or group the right to dictate to another what his opinions or belief shall be. The right to entertain and express views does not carry with it the right to force personal views upon others, and vociferous minorities may be as guilty of this unconstitutional and undemocratic usurpation of fundamental rights as organized government, and perhaps such conduct on the part of groups and individuals is the more reprehensible because it cannot be as effectively dealt with as the same sort of action on the part of governmental authority."

In the light of the foregoing distinction and brief opinion as rendered by the court, counsel for the city of Struthers sincerely requests the court to weigh the abuses which appellant would perpetuate, if not regulated by our police measure.

III.

The ordinance in question does not prohibit the distribution of literature, but merely regulates such conduct. It does not abridge the right of worship, since it fails to differentiate various classes or groups; it does

not transgress or violate the right of freedom of the press and speech, since distribution is permitted.

It is regrettable to note that this measure is assailed as being totalitarian in nature. The appellant can print any leaflet or impart any and all forms of information into a pamphlet or into a leaflet or into a booklet and then distribute this particular type of literature, without being hampered or molested by virtue of this ordinance. The information or knowledge which is printed or contained in the various pamphlets can be freely disseminated and the information can be distributed without censorship or without the requiring of a license. Can it be said that this particular ordinance constitutes an abridgment of the rights of freedom of the press and speech? The ordinance comes into play only when the householder is disturbed. The appellant and others in her group had a two-fold mission to carry out on the day in question, namely distribution and solicitation. This practice of solicitation is destroyed by the regulation or ordinance in question, and that is the chief complaint of the appellant. Counsel for appellant state that these leaflets are distributed without price. That statement must be qualified, for it is customary for the appellant and others belonging to her group to seek and request a donation from every household which they visit.

The courts of the state of Ohio have passed on this issue and they have concluded that the measure which now is facing the Supreme Court of the United States, was a reasonable exercise of the police powers.

To substantiate our position that the ordinance in question is a valid exercise of the police power, the law of Ohio pertaining to this particular subject-matter of

handbill regulation is contained in the case of **Lewis v. Washington**, 27 Abs., page 396. Plaintiff in the Washington case, claimed that he was the owner and operator of a retail grocery and meat store, and for several years past advertised his business and merchandise which he offered for sale to the public, by newspapers and by distributing small handbills each week from house to house in said city; that in the lawful pursuit of his business he had caused the handbills to be neatly folded and once each week had distributed one at the dors of the several dwelling houses of the city; that the city of Washington passed an ordinance and that by reason thereof he would not be able to advertise his business by passing handbills from house to house. He claimed that the ordinance was unreasonably discriminatory and oppressive and that since its effective date plaintiff had been hindered in the operation of his business and had suffered loss; that enforcement resulted in an infringement of his property rights and that the ordinance was violative of the federal and state Constitutions and of the statutes of Ohio. The language of the ordinance is as follows:

> "Section I. That the passing of handbills and other advertising matter of any kind from house to house in the city of Washington is an injury, a fire hazard and an annoyance to the public and the same is hereby declared to be a public nuisance.
>
> Section II. That for the protection of the public health, peace, safety and morals it shall be unlawful for any person, firm or corporation to pass handbills or distribute from house to house in any manner whatever, any advertising matter."

While it may be true that some of his customers have complained that they did not receive their weekly in-

formation about the wares that he had for sale, and other information furnished by the bills, **yet there are many other citizens who may feel relieved** because their premises are not used for the deposit of undesired advertisements.

The measure in question is not as severe as the ordinance which was upheld by the Court of Appeals in the Lewis v. Washington case. Therefore it can be rightfully concluded that the city of Struthers' ordinance is a valid exercise of the police powers.

Counsel for appellee cite the case of **Erie Railroad Company v. Tompkins**, 304 U. S., at page 67:

> "As a matter of comity at least, and by virtue of the Rules of Decision Act, as well, the federal courts are bound to recognize an asserted rule of state law where the evidence in the form of state decisions is sufficiently conclusive, in other words, when the asserted rule is established with sufficient definiteness and finality."

In the light of the Ohio decisions and in the light of the interpretation placed upon the ordinance in question by the Ohio courts, appellee urges the Supreme Court of the United States to consider the "well being" and community welfare features which the police measure preserves and keeps intact.

There are numerous decisions throughout the various states of the Union, which decisions enunciate the rule that municipalities have the right to pass police measures to regulate the distribution of handbills and literature. A series of these cases, with excerpts will be cited to conclude appellee's brief, starting with the case of **Town of Green River v. Bunger**, 58 Pac. Rep., 456:

> "The practice of going in and upon private resi-

dences in the town of Green River, Wyoming, by solicitors, peddlers, hawkers, itinerant merchants and transient vendors of merchandise not having been requested or invited so to do by the owner, or owners, occupant or occupants, of said private residences, for the purpose of soliciting orders for the sale of goods, wares or merchandise, and/or for the purpose of disposing of and/or peddling or hawking the same, is hereby declared to be a nuisance, and punishable as such as a misdemeanor."

The defendant in the Green River case was hired as a Fuller brush salesman, by the Fuller Brush Company. His actions and activities were parallel to the activities carried on by the appellant in the case at bar, and yet the court held that the police measure enacted to regulate such practices was reasonable.

In a federal case found in 65 Fed. (2d), 112, and known as the case of **The Town of Green River v. Fuller Brush Company**, it was held as follows:

"Town held to have statutory authority to declare what constitutes a nuisance, to prevent and abate nuisances, and to inflict punishment on violators of ordinances relating to nuisances."

The practice described in the above-mentioned case was peaceful, yet the court held it to be a nuisance subject to regulation by proper police powers.

Another case, which contains an entire treatise on the issue confronting this court, is found in 99 Pac., 969, at page 976, wherein the following statement is made by the court:

"To sustain the ordinance (an ordinance somewhat similar to the one under discussion,) we think it unnecessary to decide that the practice which it denounces is a nuisance. The declaration to that

effect shows, however, that the purpose of the ordinance is to prevent disturbance and annoyance, the important elements of nuisance. And if the ordinance is a legitimate exercise of the power of the town to prevent disturbances, under subdivision 12 of Section 22-1427, supra, it ought not to be held invalid because it erroneously applied the term 'nuisance' to the forbidden conduct."

Another case which is directly associated with the case now being tried is found in 169 Atl., page 344, known as **Allen v. McGovern.** In this case Nelson Allen was convicted of violating an ordinance of Jersey City prohibiting distribution of unsolicited advertising matter to householders. The ordinance under which the above party was convicted was as follows:

"No person shall distribute or cause to be distributed to the occupants of any house, place or cause to be placed in any areaway, in front of, or along the side of any house, or upon the doorstep thereof any newspaper, paper, periodical, book, magazine, circular, card or pamphlet, unless the same has been previously ordered by the person in actual occupation of the house, in the areaway of which, in front of which, or along the side or doorstep of which said newspaper, paper, periodical, book, magazine, circular, card, or pamphlet shall be distributed or placed."

Under the facts in this case, the convicted party had called at a private residence and delivered an unsolicited advertising circular to the occupant. The court held:

"That the Legislature has delegated to the municipality the duty to preserve the public peace and good order.

There is also the power to regulate the ringing of bells and crying of goods. City life is very complex. There can be no doubt that the city can

prevent the misuse of the streets. But can it prevent the distribution to householders of unsolicited advertising matter? **We think it can.**

The records in this case demonstrate that the municipality had reasonable cause to believe that the unsolicited distribution of the advertising mediums named in the ordinance was detrimental to the public peace and good order. By so doing the city has not violated the organic law. It has not deprived advertisers of the opportunity to advertise their goods or to approach possible customers: All that it has prohibited is the unsolicited distribution of books and papers among householders. Ordinances have been long upheld as within the police power when the design was to prevent the cluttering of the streets and the frightening of horses. The fact that the prosecutor (meaning the defendant) first rang the doorbell and then handed in the unsolicited advertising matter does not alter the situation, since the city must regulate the use of its streets for the good of the greatest number. There are restraints upon everyone for the common good. The city commissioners, being familiar with the local conditions, are primarily the judges of the necessity.

Jacobson v. Mass., 197 U. S., 11.

There can be no question that the city could exclude beggars, peddlers and panhandlers from its streets, and the mere circumstance that these persons should adopt the doorbell method of approach would in no sense enlarge their rights. It seems to us that therefore the ordinance, in so far as it prohibits the unsolicited distribution of papers, magazines, advertising matters, and other articles mentioned in it, violates no constitutional privilege."

At the outset the court must remember that the ordinance does not place a restriction upon the distribution of literature and handbills. The "Witnesses" may go

from porch to porch and house to house and place their pamphlets on the porches without ringing the bell or summoning the party living in the premises to the door.

Other cases bearing on the above point are found in:

Coleman v. City of Griffin, 189 S. E., 427;
Bayley v. Garrison, 190 Cal., 690, 214 Pac., 871;
San Francisco News Co. v. City of South San Francisco, 69 Fed: (2d), 886;
Jell-O Company v. Brown, Mayor, 3 Fed. Supp., 132;
Dziatkiewicz v. Township of Maplewood, 178 Atl., 205.

CONCLUSION.

The ordinance under discussion does not bar distribution from house to house, but it merely prohibits the distribution thereof by ringing doorbells and otherwise summoning the occupants of the household to the door for the purpose of receiving circulars, handbills, etc. This was intended possibly to control a condition or a nuisance which surrounds the distribution of pamphlets. All persons are treated alike and are subject to the same restrictions. Therefore, no constitutional clause of the state Constitution or of the federal Constitution has any part to pay in this case. The case of **Dziatkiewicz v. Township of Maplewood**, 178 Atl., 205, Syllabus 7:

> "Township ordinances prohibiting canvassing, soliciting or distributing of circulars or other matter without permit held not invalid or unreasonable when applied to persons engaged in the furthering their religious principles through spreading their religious conceptions to the public and such persons were not immune to such police regulation."

The opinion of the court as contained on page 208 of the above-mentioned case may have a bearing on the issues involved, to wit:

> "It would seem to this court that men and women engaged in the lofty and idealistic work as the prosecutors claim to have been engaged herein, i. e. of spreading their religious conceptions to the public at large, ought to be among the very first to submit to and comply with all reasonable regulations, which, obviously, were enacted in the interest of the public health."

Furthermore, it can safely be said that this ordinance s a mere regulatory measure intended to promote ommunity welfare, benefiting the community at large nd not creating a hardship for anyone or any group of ndividuals. It must be remembered that the ordinance loes not prohibit distribution, but it tends to define the ourse which one must follow while distributing the iterature or pamphlets throughout the municipal limits f the city of Struthers.

Wherefore, this appellee contends and urges the court o uphold the convictions and decisions of the lower ourts by sustaining the ordinance in question.

Respectfully submitted,

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